

N.D.A.G. Letter to Person (Jan. 11, 1988)

January 11, 1988

Mr. Alan Person
Executive Director
North Dakota Public Employees
Retirement System
P. O. Box 1214
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your letter of November 30, 1987, in which you request my opinion on two issues. First, you ask whether the North Dakota Public Employees Retirement System's (NDPERS) retirement fund assets have any legal exposure resulting from the financial difficulties experienced by the group health plan for state employees. Second, you ask whether Blue Cross Blue Shield of North Dakota (BCBS) is legally obligated to provide NDPERS with certain claims information. I will respond to your questions in the order presented.

NDPERS is responsible for administering the public employees' retirement program and the uniform group health insurance program. See generally N.D.C.C. chs. 54-52 and 54-52.1. Although the two programs are administered by the same agency, they are distinct and independent of each other. This is especially true in regard to the funding and fiscal administration of each of the programs.

The funding for the retirement program is established by N.D.C.C. §§ 54-52-05, 54-52-06, and 54-52-06.1. These statutes set forth the amount of retirement contributions and the manner in which these contributions should be paid to the Retirement Fund. N.D.C.C. § 54-52-13 provides that all such moneys "shall be deposited in the public employees retirement fund account with the Bank of North Dakota." N.D.C.C. § 54-52-13 further provides that "all of said moneys, not otherwise appropriated, are hereby appropriated for the purpose of making investments for the employees retirement fund and to make payments to beneficiaries under the program."

The assets of the Retirement Fund are held in trust for the benefit of the members. Indeed, it has been successfully argued that the assets of a state pension plan are owned by the members of the system and not the state. Sprague v. Straub, 451 P.2d 49 (Or. 1969); Louisiana State Employees Retirement System v. State of La., 423 S.2d 73 (La. Ct. App. 1982), aff'd, 427 S.2d 1206 (La. 1983).

Having determined that the assets of the Retirement Fund are held in trust for its members, it is important to note that the membership of the retirement system is not coincident with the membership of the uniform group health insurance plan. Members of

the retirement system who are not participants in the group health plan include HMO enrollees, employees of political subdivisions that have not joined the state's uniform group health insurance program, retirees who have elected not to participate in the group health insurance program, and former public employees who have left their vested benefits with the Retirement Fund. Thus, it is imperative that the retirement system be fiscally independent of the state's group health plan.

The funding for the uniform group insurance program is set forth in N.D.C.C. § 54-52.1-06. In that section, it is provided that the departments, boards, and agencies of the state must pay the legislatively determined monthly premium to PERS which, in turn, pays the proper insurance carrier or provider. Any excess premiums that are not necessary to pay claims or the costs of administration of the program are to be credited in a separate fund "to be used by the board to reduce the amount of premium amounts paid monthly by enrolled eligible employees, to reduce any increase in premium amounts paid monthly by enrolled eligible employees or to provide increased insurance coverage, as the board may determine." N.D.C.C. § 54-52.1-06. Nowhere in N.D.C.C. chs. 54-52 or 54-52.1 is there any indication that the group health plan is not fiscally independent from other funds of the state, including the Retirement Fund.

In summary, it is my opinion that the retirement program and group health plan are legally independent. This includes all aspects of funding and fiscal administration. As such, the Retirement Fund has no more legal exposure for the potential financial liabilities of the group health plan beyond that of any other special trust fund of the state.

Additionally, N.D.C.C. § 32-12-04 provides that a judgment against the state can only be satisfied if funds have been appropriated by the Legislature for that specific purpose. There would be no basis for the judgment to be satisfied from the Retirement Fund, or other assets of the state, in the absence of such a legislative appropriation for that specific purpose.

I will now respond to your second area of inquiry. It is our understanding that BCBS has refused to provide PERS with requested claims information regarding the PERS' health plan. Specifically, BCBS refuses to provide PERS with the actual charges by the medical providers and only discloses the amount of any particular claim actually paid under the plan (i.e., the usual customary and reasonable charge (UCR)). The UCR is merely a rolling average based on past history and, thus, does not provide PERS with the actual medical charges which would assist PERS in estimating future claims and initiating cost containment measures.

The 1987 Legislative Assembly established that the medical records and related data in the possession of BCBS regarding the state's group health insurance program is the property of PERS. N.D.C.C. § 54-52.1-12 states as follows:

54-52.1-12. Ownership and confidentiality of the uniform group health insurance medical records of employees, retirees, and dependents. The medical records and related data of the employees, retirees, and

dependents, obtained as the result of enrollment in the uniform group insurance program, are the property of the public employees retirement system. The records and data are confidential and are not public records. However, the board may allow administrators of administrative services only contracts or third-party administrators contracts access to the records and data where it is required in the performance of the administrator's duties pursuant to the contract. No administrator may be held liable for furnishing to the board information with respect to any patient, or any physician, hospital, or other health care provider.

(Emphasis supplied.)

It appears from the legislative history that the specific intent of this amendment was to provide the PERS Board with access to information held by the health insurance plan administrator relating to actual charges by health care providers. See Hearing on H. 1023 Before the Senate Appropriations Committee, 50th Leg. (1987) (statement of Mr. Alan Person).

The administrative services agreement between BCBS and PERS contains several clauses setting forth BCBS' responsibility to provide PERS with medical claims information. Paragraph 2.2(c) of the agreement states as follows:

2.2 Specific Services. Blue Cross and Blue Shield shall provide the following administration and claims processing services under the North Dakota Public Employees Group Health Benefits Plan (Plan):

.....

- c. Preparation and distribution of an appropriate Explanation of Benefits (EOB). The EOB must reflect the name of the claimant and the patient, the date of service, the provider, the dollar amount charged, the dollar amount paid, the separate dollar amounts not paid because of Plan deductibles, coinsurance, and for non-covered services or amounts. The EOB must also reflect the remaining deductible amounts to be satisfied and other pertinent information as directed by PERS. In the event of a denied claim, the reason for the denial must be indicated on the EOB along with other information necessary to clearly explain the denial of the claim.

Paragraph 2.3 of the agreement states in relevant part as follows:

2.3 Recordkeeping.

- a. Blue Cross and Blue Shield shall maintain records covering claims for participating employees and the employees'

dependents on an individual and on an aggregate basis.

- b. Blue Cross and Blue Shield shall maintain records on the types and amounts of services provided by each provider of such services for claims submitted under the Plan. These records shall be maintained separately for each provider of such services and in the aggregate.
- c. All records prepared or maintained by Blue Cross and Blue Shield in the administration and the payment of claims shall be the property of PERS. All such records shall be treated by Blue Cross Blue Shield as confidential and, under North Dakota 1987 House Bill No. 1023, are not a matter of public record. Blue Cross Blue Shield is not liable for furnishing such records to PERS.

Blue Cross Blue Shield shall deliver all such records to PERS upon request by PERS and in the event of termination of this agreement. If any records are maintained on microfilm, microfiche or electronic tape, the delivery of the microfilm, microfiche or electronic tape shall be considered to be in compliance with this section. Notwithstanding the foregoing, Blue Cross and Blue Shield may, at its own expense, make and retain copies of all those records and shall have full access to all those records turned over to PERS in the event a claim is asserted against Blue Cross and Blue Shield by PERS or any other party and arising out of administration or payment of claims.

(Emphasis supplied.)

Additionally, paragraph 2.4 of the administrative services agreement states in part as follows:

2.4 Reporting.

Blue Cross and Blue Shield shall provide the following:

....

- b. An analysis of claims payments (monthly and year-to-date). The analysis should include the following information:
 - i. The number of claims paid by type of service, including dollar amount claimed, total allowable charges, deductibles taken, amount paid by type of service, shown separately by categories as established by PERS.

....

iii. Other specific claims data as requested by PERS.

....

g. Such other special claims reports as requested from time-to-time by PERS subject to the availability of data and appropriate cost considerations.

N.D.C.C. § 54-52.1-12 and the administrative services agreement clearly establish that PERS is entitled to the claims information that it has requested. I can find no legal basis for BCBS' argument that this is "proprietary information" and cannot be released to PERS. As such, it is my opinion that BCBS is legally obligated to provide PERS with the desired information regarding medical claims.

Sincerely,

Nicholas J. Spaeth

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